Durham Transportation, Inc. *and* James A. Hermann *and* Texas State Teachers Association, Busdriver's Local. Cases 16–CA–15567 and 16–CA–15567–2

May 31, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND TRUESDALE

The questions presented here are: (1) whether the judge correctly found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging six employees who it mistakenly believed had participated in an unprotected work stoppage; and (2) whether the judge correctly declined to order the Respondent to offer reinstatement to the discriminatees.[1] The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as further explained below, and to adopt the recommended Order, as modified to include a reinstatement remedy.

In early 1992, the Board certified the Union as the collective-bargaining representative of a unit of drivers and mechanics employed by the Respondent. Negotiations for a first agreement began in March. At the second session, on March 24, there were heated exchanges between the Respondent's chief representative, Oliver Butler, and Robert Briseno, one of the employee members of the Union's negotiating teams. Briseno was upset by Butler's disparagement of the Union's bargaining proposals as ''garbage,'' his insistence that all union representatives (many of whom were Hispanic) speak only English during the negotiations, and his refusal to discuss the grievances of two discharged employees. After the morning bargaining session, Briseno conveyed to fellow employees his views about the Respondent's conduct.

In response to Briseno's report, a number of the drivers engaged in a work stoppage by failing to report for their assigned bus driving routes that afternoon. They milled around outside the gate of the Brownsville terminal. Refugio Rivas, Martin Garcia, Basilia Sauceda, Rolanda Pena, Juan Salas, and Mario Herrera did not join in the work stoppage. Instead, their solidarity with fellow employees was manifested simply by their stopping briefly outside the gate to speak to their protesting coworkers. Garcia did this on March 24, after completing his assigned route, and the others (except, possibly, for Herrera) did so before attempting to report to work on March 25. In response to the events of March 24, the Respondent terminated more than 50 drivers, including the 6 who did not withhold their services.

The complaint before the judge alleged that the employees' actions on March 24 were protected by Section 7 of the Act and that the Respondent had violated Section 8(a)(3) and (1) in terminating the employees. The judge held that, regarding those employees who expressed their opposition to the Respondent's negotiating tactics by engaging in a work stoppage, the terminations were lawful. He reasoned that because the work stoppage was against the will of the Union's chief collective-bargaining representative, it was therefore an unprotected wildcat strike. In the absence of exceptions to this finding, the dismissal of the allegations pertaining to the employees who actually participated in the work stoppage are not properly before us and must be adopted pro forma.

The judge found unlawful the Respondent's discharges of the six employees named above. He based that conclusion on his finding that these six had ''attempted to continue working without interruption, but were barred from the premises by security guards at the gate who erroneously believed, for whatever reason, that the drivers had engaged in unprotected conduct by withholding their services and joining the strikers.'' In so ruling, the judge relied on precedent holding that discharges are unlawful if based on an employer's mistaken belief that the employees in question had engaged in some unprotected conduct while participating in otherwise protected strike activity.[2]

In exceptions, the Respondent argues that such precedent is inapposite because the six alleged discriminatees had never personally engaged in any protected union or other concerted activity. Rather, the Respondent contends, the only concerted activity at issue was the unprotected work stoppage, and a discharge based on a mistaken belief that these employees had participated in such a stoppage does not constitute a violation of any right discernible in the Act. We disagree because, as explained below, the unprotected work stoppage was only one aspect of the employees' collective opposition to the Respondent's bargaining table conduct. The six alleged discriminatees were in effect penalized for apparently engaging in a more restrained manifestation of that opposition, which was protected by the Act.

Section 7 of the Act expressly protects the right ''to engage in . . . concerted activities for the purpose of collective bargaining,'' and it is surely beyond dispute that employees' manifestations of support for their union's bargaining proposals and of opposition to their employer's bargaining positions or tactics generally

[1] On July 14, 1993, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

[2] *Augusta Bakery Corp.*, 298 NLRB 58 (1990), enfd. 957 F.2d 1467 (7th Cir. 1992); *Roto Rooter*, 288 NLRB 1025 (1988).

fall within that protection.[3] To be sure, otherwise protected protests may sometimes lose the protection of the Act because of the form they take; and, as noted above, the judge's finding in this case that the employees whose protest went so far as a work stoppage lost the Act's protection is not open to our review. Concerning the issue that is before us, the Respondent does not and cannot contend that the actions the six alleged discriminatees took with respect to the bargaining dispute—merely speaking with their protesting fellow employees outside the gate—took them beyond the protections of the Act. Yet that was the only dispute-related action in which they had engaged prior to being denied entrance to the plant to perform their work. Indeed, according to the credited testimony of employees Sauceda and Salas, a guard told each of them that he could not enter because he had been seen talking to his fellow employees outside the gate.

The precedents cited by the judge, which derive ultimately from *NLRB v. Burnup & Sims*, 379 U.S. 21, 23 (1964), are relevant for the following reasons.[4] In *Burnup & Sims*, the Court affirmed longstanding Board precedent holding that an employer violates the Act by discharging an employee ''for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred.'' Id. at 23. In this case, the protected activity was opposition to the Respondent's bargaining positions and tactics, and the misconduct that the Respondent mistakenly imputed to the six discriminatees was the unprotected work stoppage.

Of course, the Respondent's general contention that the six employees had not engaged in any protected activity may be taken as including an argument that they were not actually overheard discussing the bargaining dispute when they paused to speak with their protesting coworkers. That contention would miss the point. The workers assembled outside the gate were there because of the bargaining dispute and coworkers speaking to them could reasonably be perceived as making common cause with them. On this point, the principles of *Ideal Dyeing & Finishing Co.*, 300 NLRB 303 (1990), are instructive. There, the Board invoked the reasoning of *Burnup & Sims* to find a violation of Section 8(a)(1) of the Act on the basis of evidence that an employer had fired an employee whom it mistakenly believed had threatened another employee in order to coerce the latter's support for a union organizing campaign. In response to an argument that *Burnup & Sims* was inapposite because the terminated employee had not openly approached the threatened employee or any other employee during the campaign, the Board said,

> We reject the Respondent' argument because it misperceives the Supreme Court's reasoning in *Burnup & Sims*. Protected activity, the Court said, would lose some of its immunity if employers could (even in good faith) discharge employees on false charges, because the examples of those discharges could have a deterrent effect on other employees. Although the Court was referring to situations such as the one before it, in which the discharged employees were known to have engaged in protected activities, its reasoning is not limited to those situations alone. Rather, it extends to all cases in which employees are erroneously disciplined or discharged because of alleged misconduct arising out of protected activities that are known to the employer, whether or not the affected employees actually took part in the protected activities. Thus, when an employer, like the Respondent, is aware that a union organizing campaign is under way and it discharges an employee because it mistakenly believes that he has engaged in misconduct arising out of that campaign, the employer's action has the same potential deterrent effect on other employees that concerned the Court in *Burnup & Sims*. The employees would reasonably fear that the continued

[3] See, e.g., *Sacramento Union*, 291 NLRB 540, 549 (1988), enfd. sub nom. *Sierra Publishing Co. v. NLRB*, 889 F.2d 210 (9th Cir. 1989).

[4] Our concurring colleague faults us for ignoring the judge's finding that ''the walkout was contrary to and in criticism of the objectives of the Union.'' In fact, we fully acknowledge that finding and the subsidiary findings that Briseno and some of the other employee representatives on the negotiating committee disagreed with the professional union negotiators on at least three points: (1) whether, as a tactical matter, the Union should press for reinstatement of two recently suspended unit employees during contract negotiations or later on; (2) whether hostile remarks made by the Respondent's main negotiator were (as the experienced union negotiator viewed them) ordinary ''bargaining methods,'' even if insulting, or were, as Briseno viewed them, demeaning to the dignity of employees of Mexican origin and not reflective of sincere consideration of the employees' contract demands; and (3) whether the employees should engage in a walkout in support of their position. No findings were made concerning differences in substantive demands, as opposed to tactical considerations, and the judge did not find, nor could we conceive of finding, that employees have no right under Sec. 7 of the Act to join together in discussing their unhappiness with the pace or tone of negotiations, even if their views are somewhat different from those of the chief union spokesman.

We note that the relevant complaint allegation is that the employees were unlawfully discharged for ''holding a meeting outside Respondent's Brownsville terminal gate to discuss matters covered at a recently-concluded bargaining session, including wages, benefits, and the status of two discharged employees.'' The judge dismissed the allegations about all employees who, he found, had actually gone beyond discussion of those matters to engage in a strike. As noted above, he found the strike unprotected because it was contrary to the will of the lead union negotiator. He found unlawful discharges regarding employees who had been outside the gate with the others but who, he concluded, did not join the strike. Our analysis takes account of that parsing of the complaint, and we believe it better comports with the theory on which the case was litigated than our concurring colleague's approach. It differs from the judge's analysis only to the extent necessary to respond to arguments raised in the Respondent's exceptions.

> conduct of the organizing campaign in their plant would put them at risk of being mistakenly punished for the excesses of others engaged in the campaign. [300 NLRB at 303, footnotes omitted.]

Here, by analogy to the facts of *Ideal Dyeing*, the Respondent's termination of the six employees could cause them and other employees aware of their discharges reasonably to fear that any association with a protest in support of the Union's bargaining position might ''put them at risk of being mistakenly punished for the excesses of others'' engaged in the protest. We therefore find that the Respondent's termination of Rivas, Garcia, Sauceda, Pena, Salas, and Herrera violated Section 8(a)(1) of the Act.[5]

AMENDED REMEDY

The judge declined to recommend that the Respondent offer reinstatement to the discriminatees. He found that reinstatement was inappropriate due to the termination of the Respondent's contract with the Brownsville, Texas school district and the consequent termination of the bargaining relationship covering the unit employees working at the facility serving that district. Contrary to the judge, we find the Board's traditional reinstatement remedy for unlawful discharges is appropriate here. The termination of the Respondent's bargaining relationship with the Union has no bearing on the remedial reinstatement rights of individual discriminatees. Furthermore, the termination of the Brownsville school district contract is not conclusive of the reinstatement issue at the unfair labor practice stage of this proceeding, particularly when the record indicates that the Respondent continues to provide bus transportation services elsewhere. The effect of the termination of operations on discriminatees' rights to reinstatement and backpay is customarily a compliance matter.[6] Accordingly, we will order the Respondent to provide full reinstatement and backpay to the six discriminatees, leaving to the compliance proceedings all unresolved matters that may affect these remedial rights. Further, the Respondent will remove from its files any reference to the unlawful discharges.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Durham Transportation, Inc., Brownsville, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Offer Refugio Rivas, Martin Garcia, Basilia Sauceda, Rolando Pena, Juan Salas, and Mario Herrera immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, with interest.''

2. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

''(c) Remove from its files any reference to the unlawful discharges and notify the employees in writing that this has been done and that the discharges will not be used against them in any way.''

3. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN GOULD, concurring.

I agree that the Respondent violated Section 8(a)(1) of the Act by discharging six employees who continued to work and did not participate in an unprotected work stoppage.[1] I cannot agree, however, with the reasoning of the majority opinion. In sum, my colleagues find there was a distinct, severable, and protected aspect of the work stoppage—i.e., concerted discussion of objectives in support of the Union's bargaining position and in opposition to the Respondent's bargaining position and tactics. They further find that the six employees engaged in such discussions with coworkers participating in the work stoppage. They then conclude that the discharges of these six employees, based on a mistaken belief that they had joined the work stoppage, unlawfully coerced them for engaging in protected discussion.

The record simply does not support the majority's theory of violation. There are no exceptions to the judge's finding that participants in the work stoppage espoused a bargaining position *which was contrary to*

[5] Because we find that the discharges violated Sec. 8(a)(1), we find it unnecessary to decide whether it also violated Sec. 8(a)(3). A finding of an 8(a)(3) violation would not materially affect the remedy. Furthermore, we note that, although the judge stated that the Respondent violated Sec. 8(a)(3) and (1), the cease-and-desist provisions of his recommended Order contain no reference to the discrimination language of Sec. 8(a)(3), but rather are couched in the language generally employed for Sec. 8(a)(1) violations.

[6] See *Daka, Inc.*, 310 NLRB 201 (1993); *Dean General Contractors*, 285 NLRB 573 (1987).

[1] There are no exceptions to the judge's finding, with which I agree, that the walkout was unprotected. I note that the judge referred to the Fifth Circuit's analysis of statutory protection for unauthorized work stoppages in *NLRB v. R. C. Can Co.*, 328 F.2d 974 (1964). He correctly stated that the court has expressed doubts about the viability of its own doctrine. See *NLRB v. Shop Rite Foods*, 430 F.2d 786 (1970). Although the Board has apparently adhered to the *R. C. Can* doctrine, it has limited its application to narrow factual circumstances. *Energy Coal Partnership*, 269 NLRB 770, 771 (1984). I question the excessively protective approach to unauthorized work stoppages inherent in the *R.C. Can* doctrine, and, in the appropriate case, would consider expressly overruling Board precedent applying that doctrine. See Gould, *The Status of Unauthorized and ''Wildcat'' Strikes Under the National Labor Relations Act*, 52 Cornell L. Q. 672 (1967).

and in criticism of the objectives of the Union.[2] More importantly, there is no evidence that any of the six employees agreed with or engaged in any activity in support of the dissident's objectives. They certainly did not join the work stoppage, and one could reasonably infer from their refusal to do so that, if they held any opinion at all about the negotiations, they favored the Union's official objectives rather than those of the dissidents. Indeed, only one of the five employees who testified about brief conversations with coworkers assembled outside the Respondent's gates even mentioned discussing the labor dispute.

In my view, the basis for finding the Respondent's conduct to be unlawful is quite straightforward. Each of the six employees refused to go on strike and attempted to continue working. Section 7 of the Act clearly protects the employee right to refrain from engaging in a lawful strike.[3] It would seem, a fortiori, to protect the right of an employee to refrain from engaging in an unprotected strike. Consequently, when the Respondent discharged the six employees based on an allegedly erroneous belief that they had joined the work stoppage, it coerced them in the exercise of the protected right to refrain from engaging in strike activity. This analysis is consistent with the judge's analysis, and I would affirm the judge's finding of a violation on this basis.

[2] In the circumstances of this case, the Union's objectives were expressed through its official spokesperson, Latitia Torres, rather than through Robert Briseno, local president and negotiating committee chair, who led the work stoppage.

[3] See *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge employees because of a mistaken belief that they have participated in an unprotected wildcat strike against the Company when, in fact, they did not participate in such a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Refugio Rivas, Martin Garcia, Basilia Sauceda, Rolando Pena, Juan Salas, and Mario Herrera immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

DURHAM TRANSPORTATION, INC.

Tamara J. Gant Esq., for the General Counsel.
John E. Chosy, Esq. (Carinhas, Chosy & Sullivan), of Brownsville, Texas, for the Respondent.
Keith A. Sharp, Esq. (Falk & Sharp), of Los Angeles, California, for the Respondent.
Carmen M. Rumbaut, Esq. (Larry R. Daves & Associates), of San Antonio, Texas, for the Charging Party.
James A. Herman, Esq., of Harlingen, Texas, for the named employees.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in Brownsville, Texas, on February 9–12 and 23, 1993. The charge was filed on May 11, 1992, by James A. Herman, attorney, on behalf of some 62 employees of Durham Transportation, Inc. (the Respondent). The charge was amended on May 14, 1992. Thereafter, on June 30, 1992, the Regional Director for Region 16 of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing alleging a violation by the Respondent of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). An amended complaint was issued on October 13, 1992.

The parties were afforded a full opportunity to be heard, to call, to examine and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from the General Counsel, counsel for the named employees, and counsel for the Respondent.[1]

On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted, I make the following

[1] The Respondent submitted a reply brief that has not been considered as there has been no agreement that reply briefs be filed in this proceeding. The General Counsel's motion to strike portions of Respondent's brief has been considered and is denied.

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a California corporation with an office and place of business located in Brownsville, Texas, and is engaged in the business of providing school transportation. At times material, in the course and conduct of its business operations, the Respondent annually purchased and received goods and materials at its Brownsville, Texas facility valued in excess of $50,000 directly from points outside the State of Texas.

It is admitted, and I find, that the Respondent is now, and at all material times has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted, and I find, that the Texas State Teachers Association, Busdriver's Local (the Union or TSTA) is, and at all material times has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Issues*

The principal issue raised by the amended complaint is whether the Respondent has violated Section 8(a)(1) and (3) of the Act by discharging approximately 62 employees because of their protected concerted activity, namely, attending a union meeting outside of the Respondent's premises during nonworking time.

B. *The Facts*

1. Background

In about March 1991, the Respondent was awarded the contract to provide daily schoolbus transportation for some 13,000 students who attended public school in the Brownsville, Texas Independent School District. Thereupon, the approximately 140 busdrivers and mechanics who had previously performed such work as employees of the school district were hired by and became employees of the Respondent. In September 1991, prior to the advent of the Union, approximately 50 percent of Respondent's bus drivers walked off the job and refused to drive their routes. The dispute was mediated by the chief of police and the drivers returned to work after about 20 minutes. No discipline resulted from this work stoppage. The Respondent did formulate, however, a contingency plan to deal with the possibility of future work stoppages.

Union activity among the employees apparently began shortly thereafter. Employee Luis Serna testified that in October 1991, Terminal Manager Gilbert Villa told him that there were employees who were giving him problems and who wanted to introduce the Union, and that he did not want anybody who belonged to the Union. Villa said that he was going to try to find a way to fire those people.

Employee Marcial Mejia testified that in mid-November 1991, Supervisor Antonio Gracia asked him how things were going with the Union. Mejia did not respond, and Gracia warned him to be careful because the Respondent was going to fire those employees who belonged to the Union.

Following the filing of a representation petition in Case 16–RC–9467, a representation hearing was held and on December 13, 1991, the Regional Director for Region 16 of the Board issued a Decision and Direction of Election setting forth the appropriate collective-bargaining unit as follows:

> Included: All regular drivers, special education drivers, substitute drivers, and mechanics employed by the Employer at its Brownsville, Texas, facility.
>
> Excluded: All other employees, special education aides not employed by the Employer, dispatchers, guards, and supervisors as defined in the Act.

A representation election was held in mid-January 1992,[2] and a Board certification was issued shortly thereafter establishing the Union as the collective-bargaining representative for the above-described unit of employees.

2. The Union's account of the March 5 and 24 bargaining sessions

Tom Puntureri, the Union's director of the southern region of Texas and West Texas, represented the Union during the first negotiating session on March 5, together with Robert Briseno, local union president and chairman of the negotiating committee, and other members of the committee. During this meeting the ground rules for conducting negotiations were discussed. Puntureri testified that he cut the meeting short because Attorney Oliver Butler, the Respondent's representative, was ''badgering'' the committee members. The Union had previously filed an unfair labor practice charge on behalf of two employees who, according to Puntureri, had been discharged for falsifying their timesheets. Apparently Briseno insisted on discussing this matter, and Butler, directing his remarks to Briseno, said that as far as he was concerned the two guys were thieves and liars and they would never come back to work for Durham. Briseno became ''irritated'' according to Puntureri, who believed that the matter was not a proper subject for bargaining and should not have been raised. Puntureri, who does not speak Spanish, announced at that meeting that Letitia Torres, who is bilingual, would be the Union's representative at subsequent negotiations.

The second meeting was held on March 24, and began at 9 a.m. Those representing the Union were Union Representative Letitia Torres, and various members of the shop committee, including Luis Romo and Robert Briseno. Those representing the Respondent were Butler and Gilbert Villa, Brownsville terminal manager.

Union Representative Torres, the Union's chief spokesperson at the March 24 meeting, was called as a witness by the Respondent and gave the following account of the meeting and the events thereafter. Much of what she testified to is contained in an affidavit given to a Board agent during the investigation of the charge.

The Union submitted a proposed contract to the Respondent. Attorney Butler perused it, and commented regarding some of the items, although it was understood by the parties

[2] All dates or time periods hereinafter are within 1992 unless otherwise specified.

that no bargaining would take place during the meeting.[3] Butler said that the proposed contract was ''garbage'' in that it contained many unacceptable proposals and was largely a teachers' contract rather than one tailored to busdrivers and mechanics. Torres replied that changes could be made during the course of bargaining. Briseno, negotiating committee chairman, replied that the contract was not garbage and suggested that the drivers' proposals were entitled to some respect.

During the course of the meeting Briseno became obviously annoyed and, according to Torres, both she and Butler attempted to calm him down. At one point Butler happened to mention that any employee who engaged in vandalism would be terminated. Thereupon, according to Torres, Briseno and Butler ''started fighting with each other'' as Briseno took Butler's comment as a personal attack on the honesty of the drivers. This reaction by Briseno was exacerbated by the fact that he, too, was the victim of the theft of his jacket from his bus, and he apparently wanted some sort of recompense from the Respondent. Torres told Briseno to settle down.

Briseno again became upset when Butler refused Briseno's demand to immediately reinstate two drivers who had previously been suspended without pay for driving with expired licenses.[4] This topic was raised by Briseno on several occasions during the meeting. At one point Butler stated that he was going to walk out of the meeting if Briseno insisted on continuing the discussion of the suspended employees. Torres, in apparent agreement with Butler, said that this problem would no longer be discussed during the negotiations, and that the discussion would be limited to contract matters. Torres characterized some of Butler's statements as indirect verbal jabs or cutting remarks to which the employees might reasonably take offense. According to Torres, the employees might have felt insulted because Butler appeared to be ''talking down'' to them. Torres said that the insults didn't bother her personally, however, because she had become accustomed to such bargaining methods. The meeting lasted approximately 1 hour, and ended with the understanding that Butler would call Torres to schedule another meeting as soon as he checked his calendar.

When the meeting concluded, at about 11:30 a.m., Torres and the committee members discussed what had transpired. Torres explained that at the next negotiating session the parties would ''actually start bargaining.'' Briseno was upset with Torres for permitting Butler to talk to him the way he did, and admonished Torres for failing to tell Butler to shut up. According to Torres:

> Well, Robert [Briseno] was upset. He didn't really like the way the meeting had been handled at that time. He talked about the way he was treated. He felt that Mr. Butler had mistreated him and that he was not courteous towards him and he felt that, you know, that I should have stopped Mr. Butler from telling him things. So he dwelled a lot on that when we were outside.

Torres responded to Briseno that in her opinion both Butler and Briseno were equally rude to each other and that she was not going to admonish Butler to be quiet. Rather, she told Briseno that he had almost ''lost the meeting'' by nearly causing Butler to walk out as a result of his behavior.

Also, the other members of the committee expressed their view that Butler was not dealing with them in good faith. Briseno wanted Torres to go back to Butler and ''get these two guys their jobs back.'' Torres said that she could not do that until the Respondent had completed its investigation of the matter. Briseno, who had calmed down somewhat by that time, said in a loud voice that ''they were going to walk out.'' Torres believed that Briseno was ''just blowing steam,'' and reiterated to the committee what she had told Briseno and other union leaders on numerous prior occasions when they had threatened to strike: that they could not go on strike at that point and that if they did they could lose their jobs.

Briseno made another demand on Torres to go back to Butler and get the suspended drivers reinstated. Torres replied that the suspended drivers were in the wrong for driving with expired licenses and that she could not simply get them reinstated. Further, she explained to Briseno that it would be best to wait and evaluate the situation on the completion of the Respondent's investigation of the matter. Briseno then replied, according to Torres, ''We're going to walk out if these guys don't get their jobs back.'' Torres said, ''No, you can't do that.''

Luis Romo then asked if Torres was going to return to the premises at 2 p.m.[5] Torres testified that she did not know why Romo asked the question and simply believed that the employees just wanted to talk with her at that time. The possibility of a strike did not cross her mind. She replied to Romo that she had an appointment scheduled for that afternoon and would not be available; however, she also specifically reminded the committee a second time that they would lose their jobs in the event of a walkout. Torres then left the premises at 11:30 a.m.

Terminal Manager Villa testified that during the bargaining session Briseno repeatedly stated that he would ''get 140 drivers and walk out.''

3. Subsequent events on March 24

Torres returned to her office about 1 p.m. and received a phone call from Butler. They confirmed a meeting for the following week, and spoke about other matters. Butler brought up the problem with Spanish being spoken during the negotiations that day, and again requested that only bilin-

[3] Torres testified that she had previously advised the bargaining committee that collective bargaining takes ''days, months to bargain a contract,'' and that the employees should not expect immediate results.

[4] The record is unclear whether these are the same two individuals that Puntureri was referring to in his account of the March 5 meeting.

[5] Generally, the drivers worked a morning shift during which they transported students to various public schools. The afternoon shift, during which the students were transported from school to their homes, commenced at about 2 p.m. Thus, the drivers would have several interim hours off after returning to the yard from the morning shift during which time they were off the clock. Some would remain at the yard until the afternoon shift was to commence, and some would leave the premises and return to the yard prior to the afternoon shift.

gual employees be present at the meetings.[6] Torres replied that some of the union officers who may be present at future negotiating sessions could speak only Spanish and that these individuals would feel that information was being withheld from them if they did not know what was being discussed; further, she explained to Butler that it was important that such officers be present to observe or participate. It was then agreed that Torres would be the spokesperson at the meetings, that the employees could speak with her in Spanish if they desired, and that she would translate their remarks and bargain with Butler in English.

At about 1:30 p.m. Torres received a phone call from Shawn Foster, a reporter for the Brownsville Herald, the city's daily newspaper. Foster said the drivers were ''out there striking,'' and asked if the Union had initiated a strike against the Respondent. Torres told him that she didn't know what he was talking about.

About 1:40 p.m., Butler called Torres and said that a large group of employees were assembled outside the gate and someone had said that they were on strike; and he asked her whether the Union had called a strike. Torres replied that she was not aware of any strike and did not know what was going on. She did tell Butler that Briseno had said they were going to walk out, but that the members had, on other occasions, talked about going on strike, and had not done so. Butler said that he was aware that they had threatened to go on strike. Torres testified that neither she nor any other representative of the Union went to the terminal that afternoon to ascertain whether the reports of a strike or walkout were accurate, explaining that she had an appointment that afternoon, and that ''we didn't know what to believe at that time'' because none of the employees had called.

Butler testified that during the first phone conversation with Torres shortly after the March 24 bargaining session ended, he mentioned that Terminal Manager Villa had told him that drivers were coming in the gate and informing Villa that the union officers and members of the negotiating committee were trying to get them to stay outside and not work that afternoon. Torres, according to Butler, said that she knew what was going on and was sorry; that the men said they were going to walk out because they were angry that the Company didn't sign the contract; and that she had advised them that it would be illegal for them to walk out and had warned them that if they did so they would be on their own and would probably have their employment terminated. Butler asked if Torres intended to return to the terminal, and Torres said, ''no,'' that ''I have washed my hands of those hot heads . . . I can't control them.''

Butler again phoned the Union's office at 4:25 p.m. and left the following message with the secretary:

> Urgent! 55 people did not show up for work today. All of the officers & nego. team. They are all fired! Said he needs to talk To you as to where to go from here.

By letter dated March 27, Gilbert Villa, the Respondent's general manager of the Brownsville terminal, notified approximately 55 employees of their replacement and termination, as follows:

> As a result of your refusal to report to work for your scheduled shift as a School bus Driver on March 24, 1992, you have been replaced as an employee of Durham Transportation, Inc. and your employment has been terminated effective March 27, 1992.

Similar letters were sent to additional employees whom the Respondent believed had joined the alleged strike or walkout on or after March 24.

4. The March 25 meeting with Butler

Truman Dean is a staff attorney for the Union. Dean testified that on March 24, he received a phone call from Karen Johnson, general counsel of the Union and Dean's immediate supervisor. Johnson, relating information she had received from Union Representative Puntureri, told Dean there was a strike at the Respondent's terminal and instructed him to go to Brownsville for a meeting the following day in order to attempt to get the employees back to work.

The next morning, March 25, Dean and Puntureri met with Attorney Butler, and made an unconditional offer on behalf of the employees to return to work. Dean testified that he accepted Butler's representation that a strike had occurred, and there was some discussion of whether it was an economic, unfair labor practice, or wildcat strike. According to Dean, Butler made some very negative comments about the ''trouble makers,'' referred to the busdrivers as peons, referenced Hispanics as a good reason for having a poll tax, said that he was doing the Union a favor by getting rid of all the drivers who engaged in the walkout, and referred to the outrageous conduct of the bargaining committee and Briseno in particular. Dean testified that he was ''shocked'' by Butler's remarks. Butler summarily rejected the Union's request that the employees be allowed to return to work.

Dean characterized his meeting with Butler as a ''suicide mission,'' and stated, ''I was supposed to walk into Mr. Butler and beg him to put those people back to work, and that's what I did.'' Dean testified that he did have a conversation with Torres on the afternoon of March 24, but was unable to recall the conversation.

Puntureri testified that during the late afternoon of March 24, he received a phone call from his secretary who relayed a message from Butler that the Respondent had fired 55 busdrivers because they had engaged in a strike. Puntureri then phoned Briseno to find out what had happened. Briseno told him that during the afternoon the employees were gathering outside to learn what had transpired in the bargaining session, and that about 1:45 or 1:50 p.m. the security guards locked the gates; further, the buses had been driven out by other drivers. According to Puntureri, Briseno said, ''that basically the guys were locked out from Durham.'' Puntureri then spoke with the Union's general counsel, Karen Johnson, about the matter. Explaining the situation to her as he had

[6] By way of background, it should be explained that at the first two meetings Butler had expressed his concern that some of the conversation among the bargaining committee members was in Spanish. Butler, who does not speak Spanish, wanted all the discussion to be in English so he could follow the colloquy verbatim and not have to rely on an English translation from Spanish, which perhaps did not convey the nuances of the discussion. According to Torres, Butler's reluctance to permit the committee members to speak Spanish during the March 24 meeting was taken as an affront by the committee members and contributed to their indignation.

learned it from Briseno, he told Johnson that the employees had been locked out; he also apparently advised her that the Respondent took the position that the employees were discharged because they had struck.

Puntureri generally corroborated the testimony of Dean regarding Butler's vitriolic comments during the aforementioned March 25 meeting. Butler, according to Puntureri, said during the course of the meeting that ''it's been a long time since he's been at war and he loves the smell of napalm,'' and that ''the only thing these people understand is you have to hit them where it hurts, and that is in their pocketbook.'' He made disparaging remarks about Hispanics, including an Hispanic Brownsville school board member. Puntureri testified that he, too, was shocked at Butler's remarks, and that he could not believe that one attorney would talk that way to another attorney.

Butler testified that at the outset of the March 25 meeting both Dean and Butler spoke of being tired: Dean had arrived in Brownsville the night before, and Butler had been up since 3:30 that morning and had been at the Respondent's facility since 5 a.m. Butler, referencing their busy schedules, stated that, ''I suppose you got to be like the guy in the movie and love the smell of napalm in the morning.'' Puntureri did most of the talking. He said they were there to make an unconditional offer that the Respondent take the employees back to work. Butler said that the Durham management had decided not to take them back, and that they were adamant about this. Dean said that he was going to file an unfair labor practice charge alleging that this was an economic strike. When Butler began to explain what Torres had told him, Puntureri acknowledged that the employees went out on strike without the approval of the Union and in defiance of Torres' admonitions. Butler said it was not an economic strike, but rather a wildcat strike, and told Dean that he believed the NLRB would dismiss such a charge if Dean filed it.

Puntureri, according to Butler, then made an appeal for the innocent rank-and-file drivers who had joined the walkout without being aware of the possible repercussions. Butler said that was Puntureri's problem, and that the employees were ''all grownups.'' Puntureri assured him that such a walkout would not happen again, and Butler replied the Union had not been able to control its members the previous day and was in no position to make any such assurances for the future. Puntureri then suggested that the Union would not object to the discharge only of Briseno if the Respondent would reinstate the other drivers. Butler said he didn't want to get involved in that kind of ''can of worms.'' Butler dictated a file memorandum of the meeting.

During the course of the aforementioned meeting, according to Butler, Puntureri said something about the negotiating committee being out of control, and Butler said that if the Union couldn't control its members then maybe the Company did the Union a favor by terminating them. Butler did not recall making disparaging statements about an Hispanic member of the Brownsville school board at that meeting, but admits to such a reference during a later conversation after the school board canceled the Respondent's contract. He does not deny using profanity with regard to a member of the school board, stating, ''that's the way I feel about most of the people on the school board.'' Butler denies making any reference to having to hit employees where it hurts, or referring to the drivers as peons, liars, or thieves; nor did he say that he would never deal with Mexicans. Butler added that his adopted daughter is Hispanic and he would simply not say such things.[7]

5. Butler's account of the March 5 and 24 bargaining sessions

Butler testified that prior to the initial meeting on March 5, he and Puntureri had discussed the fact that most of the employees in the bargaining unit did not speak English, and Butler suggested that in order to avoid the cost and confusion and extra time involved in negotiating with the assistance of translators, it would be better if all the members of the bargaining committee spoke English. Puntureri said that, in fact, all the members of the bargaining committee did speak English. This agreement regarding English-only negotiations was confirmed at the March 5 meeting. Further, in order to avoid any language or translation difficulties, Butler refused the Union's request to provide it with a Spanish translation of any agreement that would be reached, stating that the Union could translate the document from English to Spanish if it so chose, but that only the English version would govern the collective-bargaining relationship of the parties.

Butler does admit to referring to some of the Union's proposals as ''garbage'' at the March 24 meeting, believing that such proposals were not conducive to serious bargaining. Thus, on reading through the proposals, he observed, for example, a provision for an agency shop that is unlawful in a right-to-work State; a provision for military leave not only for military personnel but for spouses of employees in the military; a provision for 8 years of leave without pay for union officers; a provision for honeymoon leave; a provision for 3 days off with pay to attend the funeral of any friend who died; and a provision for the furnishing to the Union of all financial information about the Company.

Butler also testified that he did become angry with Briseno at both meetings. Butler raised his voice and shook his finger at Briseno during the first meeting because Briseno was taking over the meeting and ''somebody had to shut him up so we could get on with our business.'' Butler stated that, in fact, Puntureri told him on March 5, that if Briseno couldn't be ''shaped up'' they were going to remove him from the committee. Butler testified that during the March 24 meeting, ''Mr. Briseno was on his feet or waving his arms, shouting, you know, shaking his finger . . . he was a very physical and vocal individual.'' In response, Butler did lean forward and raise his voice at Briseno, and told him that, ''Your shipmates got a right to pick you as their representative if they want to, but I don't have an obligation to sit here and listen to you rant and rave and cuss me, and if you don't shut up and settle down so we can get some business done,

[7] Butler volunteered that he read the transcript of the testimony of Puntureri and Dean who testified at an earlier session of the proceeding. The General Counsel maintains that because the Respondent has violated the sequestration rule invoked at the outset of the hearing, Butler's entire testimony should be stricken. I denied her motion and refused to strike Butler's testimony. In assessing Butler's veracity and recollection of the events and conversations in question, I have taken into consideration the fact that Butler's reading of the transcript was tantamount to being physically present during the hearing, and his testimony has been scrutinized accordingly.

I'm going to get up and walk out and this meeting is going to be over.''

6. Discharged drivers statements to the Board and other agencies; TEC notes of phone conversation with Torres

All of the employees who had been terminated applied for unemployment compensation with the Texas Employment Commission (TEC) and, between the dates of April 6 and 8, virtually all of the 60 employees gave sworn statements to agents of the TEC regarding their activity on March 24. All the statements were introduced into evidence in this proceeding. On April 7, two TEC statements were taken from Union President Robert Briseno, who did not testify in this proceeding.[8] One statement is as follows:

> I was terminated by Durham Transportation effective 03–27–92 as per letter received. *I was discharged because I did not work the afternoon shift of 03–24–92. I did not report to work the afternoon shift of 03–24–92, because I was explaining the negotiation results of that morning to the bus drivers. I am the Union President*. I explained to the bus drivers that Mr. Oliver J. Butler Jr., attorney for Durham Transportation stated that he would not sit down with Mexicans to negotiate the contract, because it was just trash. I explained to Mr. Butler that the contract was made by Tom Puntureri, field director for the South Texas Region for (TSTA) the Texas State Teacher's Association. Mr. Butler expressed that he did not care, and that he wold [sic] not negotiate with us. When I was going in, my bus had already left. Thus, I went home. Then, I reported to work as usual at 4:30 am. However, an armed security guard was at the gate. The guard, Humberto Cisneros told me that I was replaced. My first day of employment was 03–25–92. A picket line was not formed. [Emphasis added.]

Briseno's second statement, taken by a different TEC agent, is as follows:

> On March 24, 1992, a group of five drivers representing the drivers met with the management. I am the president of the union bus drivers and headed the group of five. The meeting was to renegotiate a suitable contract between the company (Durham) and the drivers. Present at the meeting were Mr. Villa and their attorney, Oliver J. Butler Jr, assisting the drivers was Leticia Torres from T.S.T.A. During the negotiations Mr. Butler referred to our contract as trash and went on to call the drivers names, saying ''Mexicans are trash and would [sic] not negotiate with Mexicans.'' All five drivers spoke English, I tried to continue with the discussion, but he refused he just laughed at us. The meeting ended at 11:30 am, it was my duty to inform the drivers of what had happened. Most drivers arrived at 1:45 p.m. to work. I was having a meeting with them outside—explaining the company's position when we noticed some of the buses leaving (our buses). The meeting was running late, we would have had plenty of time to make the trips but they sent out our buses with other drivers. The next day we tried to report to work again, only to find armed security guards keeping us from going in. The company had a list of drivers that were not to be allowed to work. Some of the drivers got letters saying we were fired. We have not met with them. They are avoiding us. Sixty four drivers were the number of drivers affected.

The April 7 statement of Luis Romo, a member of the Union's negotiating team, states as follows:

> I was replaced by Durham Transportation on 03–24–92, because I participated in a demonstration against Durham. Our spokesperson was trying to negotiate a new contract with company [sic]. *While this was going on, we failed to report to work*. By the time we realized, we had been replaced. The next day I reported to work, and I was told I no longer had a job. [Emphasis added.]

Romo also gave a second statement to the TEC on June 4, in which he maintains that he was ''locked out'' by the Respondent. It was stipulated that Romo reads and speaks English sufficiently well to understand the content of his TEC statement.

On April 24, Romo filed a charge, as representative of the employees, with the Texas Human Rights Commission. The charge alleges that the Respondent discriminated against the employees, as follows:

> 1. Discharging me and the other members of the Local who engaged in a peaceful protest of an unlawful employment practice; to wit, we were protesting the statements made by company representative O.J. Butler, Jr., during negotiations to a negotiating committee made up entirely of Mexican-American drivers that the company would not negotiate with Mexicans and that they only wanted people who spoke English. Mr. Butler additionally called our proposal trash and stated that Mexicans are always lying.
>
> 2. On March 25, 1992 all of us were discharged and locked out of our jobs as Bus Drivers.
>
> 3. The Brownsville Independent School District Board of Trustees have been notified of the unlawful employment practice but to date have failed and/or refused to rescind the contract with Durham Transportation, Inc. thereby countenancing this unlawful employment practice.

Enrique Bazavilvazo, who does not speak English, was selected as a union steward. On April 9, Bazavilvazo gave an affidavit to Board Agent Javier Gonzalez regarding the matter. The paragraph immediately before his signature states:

> I have had the above statement consisting of 3 handwritten pages including this one read and translated into Spanish and I fully understand what it contains and I swear that it is true and correct to the best of my knowledge and belief.

Following his signature, Board Agent Gonzalez has written the following:

[8] The General Counsel offered no reason for failing to call Briseno as a witness.

> I am fluent in Spanish and have accurately translated this statement and it was subscribed and sworn to before me on this the 9 [sic] day of April 1992.

Bazavilvazo testified that Gonzalez read the affidavit to him in English, however, and did not translate it to him in Spanish; rather, Bazavilvazo trusted Gonzalez to accurately write down what he said. The affidavit, according to Bazavilvazo, contains one material inaccuracy and one material omission. As originally taken by Gonzalez and signed by Bazavilvazo the affidavit is, in pertinent part, as follows:

> I was at work on March 24, 1992. I did do my morning run. I waited with other drivers to find out the result of the negotiation session held that day. We waited by the gas pumps. The negotiation committee came out about 11:30 a.m. The committee spread out among the employees that were waiting and told us what happened. I heard Robert Briseno say that Butler called our proposal trash and that he would not talk to committee representatives that did not talk English. *The employees then wanted to make a protest. We decided to stand outside the gate. We went to the gate and stood outside. We were about 65 to 70 people out there. I was schedule [sic] to go back to work at 2:00. I did not go back to work.*
>
> At about 2:15 to 2:20 Villa went out to the gate and talked to the employees, he said in English and Spanish that the ones that not [sic] returned to work would be replaced. He then turned around and walked away.
>
> *I did not try to go to work that day*. I did not see anyone try to go in after Villa made his comment. [Emphasis added.]

On October 5, counsel for the General Counsel spoke with Bazavilvazo about the matter. She had previously prepared a Spanish translation of his original affidavit for his signature. On reading over the Spanish translation, Bazavilvazo stated that it was not accurate in that he did not remember telling Board Agent Gonzalez that the employees wanted to ''make a protest''; rather he told Gonzalez that the employees wanted to have a union meeting. Thereupon counsel for the General Counsel changed both the English and Spanish versions of the affidavit to read ''have a union meeting'' in place of ''make a protest.'' Bazavilvazo initialed the change.[9]

During cross-examination, Bazavilvazo was asked why he did not go back to work at 2 p.m. even though, as his affidavit states, he was scheduled to do so. He testified that ''mainly the principal reason'' was because ''I saw that my work tools, the bus which I drove, and many buses left ahead of the scheduled time.'' He further acknowledged that this fact was a matter of importance, and testified that he did specifically relate this to the Board agent when he was giving his initial affidavit, but that the Board agent did not include it in his statement.

The TEC statements of the some 60 employees who were terminated contain various versions of their reasons for assembling outside the Respondent's premises on March 24. The statements are generally similar, but differ in specific content. The following excerpts from various employees' statements constitute a representative sampling of the pertinent information contained in such statements.

The statement of Ricardo Garza states: ''I was scheduled to return to work at 2:30 pm but instead joined my co-workers in a protest because we wanted our benefits . . . I only missed three hours of work on 3–24–92 due to the labor dispute.''

The statement of Jorge Fuentes states: ''I was replaced by Durham Transportation because I participated in a demonstration against Durham . . . while this was going on we failed to report to work.''

The statement of Roberto A. Rodriguez states: ''On 3/24/92 I participated in a demonstration against my employer because we (bus drivers) are very unhappy about the benefits we are getting from the company . . . we failed to report to work. . . . I worked my morning route on the 24th and then participated in the demonstration and did not report to my afternoon route.''

The statement of Fernando Pena states: ''I participated in a demonstration against our employer, Durham Transp. because we were unhappy with our benefits . . . when we heard that Durham lawyer, Mr. Butler, said that the requests were garbage and he would not negotiate with a bunch of Mexicans then we decided to demonstrate.''

The statement of Eduardo Aguilar states: ''I was discharged . . . because I participated in a demonstration of dissatisfaction . . . those who wanted to participate in the demonstration did so voluntarily . . . those who wanted to work were not restrained in any way to do so.''

The statement of Carlos Garza states: ''I was terminated by Durham Trans. after I did not go in to work on 3–24–92 . . . after learning what Durham lawyer said about our contract and Mexicans I decided to stay outside and not go in to work at 2:30 pm as scheduled. . . . I waited around the rest of the afternoon as advised by union reps . . . they insisted if enough of us did not go in to work, we may be able to get Durham staff to negotiate.''

The statement of Juan S. Mendoza states: ''I was replaced because I joined in a protest against my employer . . . we protested for about three hours outside the company.''

The statement of Dionicio A. Cuellar states: ''I took part in a protest against the company . . . while talking with spokespersons and union leaders time went by and we failed to report to work.''

The statement of Felipe Castro states: ''I was replaced after a demonstration . . . I started to talk to spokespersons and co-workers about a meeting which occurred that morning . . . time went by and before I knew it my bus was driving out with a new driver. . . . I did stay outside the company the rest of the afternoon in protest because of poor benefits and because of results of meeting.''

The statement of Augustin Serna states: ''On 3–24–92 I participated in a demonstration against my employer because we are very unhappy about benefits we are getting from the company.''

The statement of Roberto Herrera states: ''In protest several of us (union members) decided not to return to work as scheduled. . . . I guess I was terminated for missing work 5 hours on 3–24–92 . . . I was available for work the entire week except for the 5 hours I protested.''

[9] It should be noted that the original affidavit taken by Gonzalez contains numerous initials placed there by Bazavilvazo to note that he is in agreement with what is contained therein.

The statement of Daniel Garces, Jr. states: ''I worked in the morning as scheduled, but did not return that afternoon. I missed 3 hours work because I joined a demonstration along with some of my co-workers and union members to protest the fact that Durham Transportation refused to give us our benefits as promised.''[10]

The statement of Graciela Leal states: ''I was terminated because I did not report to work for my scheduled afternoon shift on March 24, 1992. . . . I did not report for work because I participated in a demonstration against Durham.''[11]

The statement of Marciel Mejia states: ''I am no longer employed with Durham Trans. because of a demonstration against my employer in which I took part in. . . . [W]e went outside to tell co-workers of the meeting . . . time went by and before I knew it, other people were driving off in the buses . . . since my bus was gone and others we stepped out side the company to wait and see what was going to happen.''

The statement of Juan J. De LaFuente states: ''We . . . protested outside for 2 to 3 hours.''

The statement of Elvia B. Flores states: ''My co-workers told me the union told employees to stop working only for the afternoon to protest . . . union representatives were also in the line and confirmed the info. . . . I was not striking but only protesting for one afternoon. . . . I was planning on working the next day.''

The statement of Jesus M. Garza states: ''I did not return to work the afternoon shift, because I participated in a demonstration of dissatisfaction with Durham Transportation's bad treatment of our union representatives.''

The statement of Francisco Prado states: ''We did not appreciate the comment made therefore that afternoon 3–24–92 at 2:00 pm when my route was to start I did not work because we began to protest against the school district due to our feelings being hurt and because of the way we were treated as far as our benefits taken away including holiday pay, vacation, and health insurance.''

The statement of Jose Rivera states: ''Union leaders and representatives advised myself and others that were we [sic] going to protest for 2 to 3 hours out in front of company . . . I did not go to work this afternoon.''

The statement of Adar Rodriguez states: ''I did not report to work that afternoon because I joined my coworkers in the demonstration.''

The statement of Jose L. Rodriguez states: ''The employees told me the union ordered them out and not to work the rest of the afternoon . . . according to union members we were only supposed to strike that afternoon. . . . I did not cross the picket line as advised by my union and because it was only supposed to be that afternoon.''

The statement of Isidro Soto states: ''I protested by refusing to drive the school bus—on Tues—3–24–92 at 12 noon.''

Notes of a TEC agent's telephone conversation with Letitia Torres, introduced into evidence, state that Torres told the agent that there was a protest which lasted 2–3 hours, and that when the employees attempted to go to work the following day they were not allowed to work and were subsequently discharged.

[10] It was stipulated that Garces reads and speaks English sufficiently well to understand the content of his English TEC statement.

[11] It was stipulated that Leal reads and speaks English sufficiently well to understand the content of her English TEC statement.

7. Regional Office's change of theory

As noted above, the Regional Office issued its initial complaint on June 30, alleging that the employees were discharged for ''engaging in a work stoppage'' in order to ''express their concern over matters discussed at a recently-concluded bargaining session, including wages, benefits and the status of two discharged employees.'' The Respondent's answer to the complaint contained the affirmative defense that the work stoppage ''was not authorized, sanctioned or endorsed by the Union and was in fact contrary to the Union's instructions. Therefore the so-called work stoppage was unlawful and not protected under the Act.'' Thereafter, the Regional Office abandoned its work-stoppage theory, and on October 13 issued an amended complaint alleging that the employees were discharged for attending a union meeting. Thus, after the Respondent set forth an affirmative defense that would absolve it from any unfair labor practices, infra, the Regional Office changed its theory of the case and determined that what it had initially characterized as a work stoppage had not been a work stoppage; rather, it was a union meeting.

8. Testimony of various drivers

Various drivers testified on behalf of the General Counsel. Their testimony on direct examination is quite similar and need not be specifically recounted. It may be summarized as follows: Each of the individuals denied that there was any intent to engage in a work stoppage on March 24; rather, they were gathered outside the gate during nonworking time at about 1:45 p.m., prior to the time they were to return to work for the afternoon shift, in order to ascertain what had transpired during the morning bargaining session; further, they were fully intending to proceed to work at the requisite time when they observed their buses leaving the premises as much as 45 minutes early, and it would have been futile to report to work thereafter because their buses were being driven by other drivers.

Each driver who testified in this proceeding applied for unemployment compensation shortly after his or her termination and gave a statement to a TEC agent setting forth the events of March 24. The 6 TEC agents who took statements from the some 60 applicants were called as witnesses by the Respondent. Each TEC agent testified that he or she took the statement from the employee on an individual basis, that the statement sets forth as accurately as possible the facts as stated by the individual, that the statements were translated from English to Spanish for each employee who did not speak or read English, and that the employee verified the accuracy of the translation.

The following seven drivers, in addition to Romo and Bazavilvazo, supra, testified on behalf of the General Counsel, and their testimony on direct examination is as indicated above.

1. Ricardo Garza does not speak English. His testimonial account of the matter was not embodied in a Board affidavit. His written statement to the TEC states that:

> I was terminated from my job as a bus driver for Durham Transportation on 3–25–92 by the security guard

> on duty that morning. He told me I was terminated because I had not reported to work the previous afternoon, as scheduled. As far as I know there was no picket line established on 3–24–92 or 3–25–92. I had reported to work as scheduled on 3–24–92 from 6:30 am to 9:00 am and 11 am to 1:00 p.m. I was scheduled to return to work at 2:30 pm but instead joined my coworkers in a protest because we wanted our benefits. Mr. Briseno, our union representative, came out of the conference with Durham, to tell us that Durham's lawyer had called us trash and MEXICANS and that he wasn't giving us anything. I only missed three hours of work on 3–24–92 due to the labor dispute. I returned to work, as scheduled, on 3–25–92 at 6:00 am but that's when the security guard would not let me in because he said I had been replaced.

There is nothing in Garza's statement about his bus leaving early. Garza, contradicting what is contained in his TEC statement, testified that he did not tell the TEC agent that he had participated in a protest, and that he didn't know what he was signing as the agent did not translate the English statement into Spanish; rather the agent just told him to sign it and he did so.

2. Jorge Fuentes speaks and reads limited English. His testimonial account of the matter was not embodied in a Board affidavit. He signed a written TEC statement, but states he did not know what he was signing; he was simply told to sign the statement and did as he was told. His TEC statement states:

> I was replaced by Durham Transportation on 03–24–92 because I participated in a demonstration against Durham. Our spokesperson was trying to negotiate a new contract with the company. While this was going on, we failed to report to work. By the time we realized, we had been replaced. I reported to work the next day, and I was told I no longer had a job. A picket line was not established.

Fuentes testified that this is not what he told the TEC agent. There is nothing in his statement about his bus leaving early.

3. Enrique Bazavilvazo does not speak English. His Board affidavit, taken by Board Agent Javier Gonzalez on April 9, does not coincide with his testimony, and he changed the affidavit on October 5, as noted above, by striking through the words ''make a protest'' and inserting the words ''have a union meeting.'' Further, his Board affidavit states, ''We decided to stand outside the gate. We went to the gate and stood outside. We were about 65 to 70 people out there. I was schedule [sic] to go back to work at 2:00. I did not go back to work.'' There is nothing in his affidavit about his bus leaving early. Apparently, Bazavilvazo did not give a statement to the TEC.

4. Marcial Mejia, secretary of the local, does not read English. Mejia gave two TEC statements. His first statement, dated April 8, states:

> I am no longer employed with Durham Trans because of a demonstration against my employer in which I took part in. Myself, other spokespersons and union leaders were trying to negotiate a contract with Durham lawyer on 3–24–92. The lawyer called our contract trash and told us he did not want to deal with Mexicans! We went outside to tell co-workers of the meeting. Time went by and before I knew it, other people were driving off in the buses. Since my bus was gone and others we stepped out side the company to wait and see what was going to happen. The next day I reported to work but was not let in and told by security I had been replaced. We're still trying to negotiate.

Mejia's second statement, dated June 3, states, ''On 03–24–92 I was in a meeting to try to negotiate a new contract with Durham Transportation. Durham sent my bus out before I was supposed to return to my shift. Thus, I demonstrated that afternoon to show my dissatisfaction with the company.''

5. Elvia B. Flores apparently does not speak English. She did not give a Board affidavit. Her TEC statement states:

> I am no longer working because of a protest in which I did not cross the line to work the afternoon of 3–24–92. I came back from lunch and saw my coworkers standing outside the company. They told me the negotiations which had taken place that morning between union and the company Durham, had not gone well. They told me the union told employees to stop working only for the afternoon to protest. Union representatives were also in the line and confirmed the info. All afternoon we stayed behind line [sic] and refused to work.
>
> I was not striking but only protesting for one afternoon. I was planning on working the next day.

There is nothing in Flores' statement indicating that she was unable to work because the buses left early.

6. Carlos Quesada does not speak English. His TEC statement states:

> On 3–24–92 I participated in a demonstration against my employer because we are very unhappy about the benefits we are getting from the company. Our spokesperson Robert Briseno was trying to negotiate a new contract with the company and while this was going on we failed to report to work.

Quesada's statement contains nothing about the buses leaving early.

7. Luis Serna does speak and read English, and it was stipulated that he speaks and reads English sufficiently well to understand the content of his TEC statement. His TEC statement states:

> I participated on 3–24–92 in a demonstration against our employer, Durham Transp. because we were unhappy with benefits our spokesperson was trying to negotiate a new contract [sic]. While this was going I [sic] failed to report to work.
>
> The next day I reported to work only to be informed I had been replaced.

Serna's statements contain nothing about the buses leaving early.

9. Testimony of drivers who did not participate in the events of March 24

The General Counsel called seven additional employees who testified that they were unjustly discharged even though they did not participate in the events of March 24. Their individual accounts of their activity on that day and on the following day, March 25, are described as follows.

1. Refugio Rivas testified that he worked the afternoon shift on March 24. He left the terminal in his bus at about 2 p.m. He went to work the following day, March 25, and stopped to speak with the assembled employees who were outside the gate. When he attempted to go to work at the scheduled time the security guard would not let him enter the premises. He went home and attempted to phone the Respondent's dispatcher but the line was busy. Then he returned to the terminal and joined the employees outside the gate.

Rivas gave a statement to the TEC. His statement, dated April 7, states, ''I was not involved with the other bus drivers on 3–24–92 when the dispute was going on so I have no idea why I was fired as well.''

2. Martin Garcia worked the afternoon shift on March 24, and when he returned from his afternoon route he mingled with the employees assembled outside the premises. He arrived at work on March 25 at the usual time, but the security guard would not let him enter the premises because he had observed Garcia standing outside with the other employees. Garcia's TEC statement is consistent with his testimony.

3. Basilia Sauceda worked the afternoon shift on March 24. Before attempting to enter the premises on March 25, he stopped and spoke with his coworkers who were assembled outside. The security guard, stating that he was enforcing the instructions of Terminal Manager Villa, refused to permit him to enter because he had been observed with the other employees. Sauceda's TEC statement is consistent with his testimony.

4. Rolando Pena worked the entire day on March 24, and did not return to the terminal until 6 p.m. On March 25, prior to his scheduled arrival time, he stopped to speak with the employees assembled outside. On reporting to work at 6:45 a.m. he was not permitted entrance into the terminal by the security guard, who said that he had been replaced. Pena's TEC statement is consistent with his testimony. The statement also states, ''Despite the fact that some of my coworkers did not report for work on March 24, I did work the entire day.''

5. Juan Salas worked all day on March 24. At about 2 p.m., Terminal Manager Villa asked Salas and several other employees whether they were going to drive their routes. Villa said the people outside had been replaced. Sales went to check his bus and left on his route at 2:15 p.m. The following morning, March 25, he arrived at work at his regularly scheduled reporting time after first stopping to talk with the employees outside. The security guard would not let him enter the terminal, stating that he did not have a job any more because he had been seen talking to his coworkers. Salas then went to a nearby market in an attempted to phone the Respondent's dispatchers, but the line was busy. He then returned to the terminal and joined the employees. Salas' TEC statement is consistent with his testimony.

6. Antonio Sierra does not speak English. He worked the entire day on March 24. Sierra had signed the attendance or sign-in sheet that advises the dispatcher of those employees who have appeared for work. At about 2:10 that afternoon Sierra observed the employees outside the gate. Terminal Manager Villa approached Sierra and two other drivers and asked them if they were joining the employees or were intending to go to work and told them to do one or the other. According to Sierra, the majority of buses had already left. Sierra asked what would be happening with his coworkers outside and Villa said they had already been replaced. Generally, Sierra leaves at about 2:20.

The following morning, March 25, Sierra arrived at work and spoke to some of the employees outside the gate for 10 or 15 minutes. The security guard would not allow him to proceed through the gate, and said that he had been replaced and that he was following Villa's instructions.

Sierra's TEC statement is as follows:

> I did not go in to work after hearing what Durham Trans. lawyer said about myself and Mexican people.
>
> On 3–24–92 I worked a special route and my regular route which kept me away from Durham from 11:00 am to 5:15 pm. I drove in, left my bus and went home. The next morning I arrived to work about 20 minutes early as I always did and found about fifty co-workers outside company grounds. Security asked me for my name and let me in. I parked my car and got out to talk to co-workers outside. This is when one of the union rep. & co-workers who represents us told me about the happenings of the day before.
>
> They told me lawyer for Durham had made a statement that the contract presented to him was trash and so were the Mexicans which he did not want to deal with. *This upset me very much so I decided to stand with my fellow workers and I did not report in to work on 3–25–92*. [Emphasis added.]

7. Mario Herrera worked the morning of March 24. Then he went to Matamoros, Mexico, which is across the International Bridge from Brownsville. While returning to the terminal for his afternoon route he found himself delayed because the traffic on the bridge was backed up. Herrera attempted to phone the dispatcher but was only able to get through to the Respondent's offices; he was put on hold and the dispatcher never answered. Thereupon, he got back in his vehicle and drove to work, but did not arrive at the terminal until 2:30 p.m. He did not attempt to enter the premises as the drivers told him that the buses had already left. The following morning the security guard would not let him enter the premises, and told Herrera that he had been replaced.

Herrera's TEC statement states:

> I did report to work [on the afternoon of March 24] but I was late because I had gone to Matamoros and it took a long time to cross the bridge. I reported to work at 2:30 pm. My bus had already left with another driver.
>
> The next day, March 25th, I attempted to enter the bus compound at my scheduled time, 6:00 am, and I was refused entry. It was at that time that I decided to join the protest movement that was in progress.

C. *Analysis and Conclusions*

The credible record evidence is overwhelming that the employees were upset with what had been reported to them by the local union leadership regarding the March 24 negotiating session and decided to engage in a work stoppage or walkout for the duration of the afternoon. Further, it is admitted that the Texas State Teachers Association, Busdriver's Local, the certified collective-bargaining representative of the busdrivers and mechanics, did not promote, authorize, or condone the walkout. To the contrary, its representative and chief negotiator, Letitia Torres, specifically and repeatedly advised Local Union President Robert Briseno that he and other employees who engaged in such an unauthorized work stoppage could be terminated by the Respondent. This, in fact, is what happened.

I do not credit the testimony of any employee who told a different story than what is contained in his or her original sworn TEC statement. Nor do I credit the employees' various assertions that they did not understand what they were signing, that the statements were not translated to them in Spanish, or that words that they did not say or did not understand were erroneously attributed to them by the TEC agents. Indeed, the TEC statements of employees who admittedly speak and read English, and for whom the English versions of the statements did not need to be translated into Spanish, contain the same substantive information as those of the employees who maintain they were misquoted.

Further, I do not find merit to the General Counsel's contention that the TEC agents were so busy with the large influx of drivers who were simultaneously applying for unemployment compensation that they did not ask the proper questions, mechanically wrote down what they believed to have happened, and caused the employees to sign abbreviated, inaccurate, simplistic, suspiciously similar, and therefore unreliable, versions of the incident. To the contrary, the statements, as set forth above, contain distinct and personalized dissimilarities, and reflect that individual attention was given by the TEC agents to the account related by each applicant. The fact that all the statements reflect one overriding theme, namely, that the employees engaged in a demonstration, or protest, or walkout, or work stoppage on March 24, and elected not to return to work that day, is not the result of deficient workmanship by the TEC agents, as alleged, but is rather attributable to the clear and common purpose of the employees.

I credit the testimony of the TEC agents who took some 60 statements from the discharged employees shortly after the events in question, and find, contrary to the contentions of the General Counsel, that each of the TEC agents did accurately set forth what they had been told by the affiants, and did accurately translate the statements from English to Spanish for those employees who do not read English; thereupon, the statements, sworn to and signed by the employees, became the true and authentic record of the facts as the employees understood them at the time.

According to Torres, whom I credit, the March 24 remarks of Attorney Butler were not inflammatory to an experienced union negotiator. It is clear that Torres was much more concerned with Briseno's quick temper and argumentative nature than with those of Butler, who appears to have expressed a reasonable rationale for the Respondent's various bargaining positions. Although the record indicates that Butler was outspoken and certainly did not attempt to ingratiate himself with the Union's bargaining committee, it also appears that this attitude may have resulted from Briseno's verbal attacks on him. In any event, it is clear that nothing he said caused Torres to even remotely consider the possibility of a work stoppage at that early stage of negotiations. Clearly, Torres had a more moderate and, I find, more accurate understanding of the parties' respective posturing that day.

The juxtaposition of Briseno's temperament and Butler's bluntness, the sensitivity of Hispanics on the bargaining committee who were apparently unfamiliar with the sometimes contentious give and take of the collective-bargaining process and who believed that Butler was being rude and demeaning toward them, Briseno's pique with Torres who refused to accede to his repeated demands that she immediately return to Butler and get the suspended drivers their jobs back, and Torres' absence from the premises that afternoon at a critical juncture, culminated in an extremely unfortunate situation. Thereupon, Briseno and some members of the bargaining committee contrived their own agenda, perhaps directed against the Union as well as the Respondent, which was knowingly contrary to and in direct disregard of the position of their collective-bargaining representative. Thus, as the Respondent would not immediately capitulate to Briseno's demands, and as Torres did not appear to be sufficiently supportive, Briseno and others decided to take matters into their own hands by initiating a work stoppage.

After having provided the drivers with only a very biased account of the bargaining session, Briseno and others convinced them to protest the Respondent's purported conduct by refusing to return to work that afternoon. As a result, some 60 individuals were terminated;[12] further, it appears that the dispute resulted in the cancellation of the Respondent's contract, thus affecting not only the large minority of employees who joined the protest, but the remainder of the employees as well, numbering some 80 individuals.

As noted, it is extremely unfortunate that Union Representative Torres was not present at the Respondent's premises to speak with the employees on the afternoon of March 24, as they were clearly given a distorted view of the negotiations by the local union leadership. Had Torres been present to relate her version of the negotiations and issue a direct warning to the assembled employees that their jobs were in jeopardy if they elected to refrain from working, it is at least a possibility that the volatile situation may have been diffused to the benefit of all the parties.

Although Torres testified that she did not return to the premises at 2 p.m. when the employees were scheduled to return to work because she had another appointment that

[12] The Respondent's decision to refuse to reinstate the employees, most of whom did not know what had actually transpired during the negotiations, is also unfortunate, but perhaps understandable. Thus, the Respondent was attempting to show that it could not be dictated to by a splinter group of employees who decided to walk out on a whim of their own at the very commencement of collective-bargaining negotiations. Further, as noted above, a similar walkout had occurred some 6 months earlier, in September 1991, prior to the time the drivers became represented by the Union. As a result of this earlier walkout the Respondent formulated a contingency plan that it put into effect on March 24.

afternoon,[13] it is clear that she had earlier left the facility under circumstances which, it may be reasonably presumed, would strongly indicate that a wildcat strike situation was imminent or was at least a distinct possibility. Then, at about 1:30 p.m., Butler represented to Torres that employees were assembling outside the gate and that members of the negotiating committee were trying to get employees to walk out. Even at this point, according to Torres, she did not return to the terminal because she had not heard anything from the employees and did not know what was happening. There appears to be no plausible rational for Torres' avowed reluctance to return to the facility to discover, for herself, what was happening unless she in fact knew precisely what was happening; certainly no previously scheduled appointment is of more immediate concern than an imminent wildcat strike. Indeed, according to Butler, Torres acknowledged that she did know what was about to happen, and related that the drivers were going to walk out, that she was sorry, and that she had ''washed her hands of those hot heads. . . . I can't control them.'' I credit Butler's account of this conversation with Torres.

Further, it seems clear that the union representatives did not believe Briseno's alleged characterization of the incident as a lockout by the Respondent, but rather credited Butler's telephonic report that a strike had occurred. Thus, Dean, an experienced labor attorney, described the purpose of his meeting with Butler as a ''suicide mission'' during which he had no alternative but to ''beg'' for reinstatement of the drivers. Had the union representatives believed that an unlawful lockout, rather than a work stoppage, had occurred, it is reasonable to conclude that Dean, thusly armed with information that by locking out the employees the Respondent had committed blatant unfair labor practices, would have been on the offensive and would have demanded, rather than begged for, their immediate reinstatement. I thus credit Butler's account of the March 25 meeting, and find that Puntureri did acknowledge that the employees had engaged in a walkout.[14]

It is clear that when the complaint was initially issued, the evidence gathered during the Regional Office's investigation supported the theory that the employees had engaged in a protest or demonstration or work stoppage on the afternoon of March 24; this is what the affidavits stated and what the complaint alleged. Further, this is corroborated by the TEC statements and the allegations of Local Union Representative Luis Romo contained in his April 24 charge filed with the Texas Human Rights Commission and the EEOC. Regardless of what caused the Regional Office to later maintain that in fact there was no work stoppage, but rather a wholesale discharge of employees who were simply attending a union meeting during their off-duty hours, the General Counsel's change of theory is subject to the same scrutiny and may be viewed with the same suspicion as the shifting and inconsistent reasons given by an employer for the discharge of an employee. Although the Regional Office is maintaining, in effect, that it was initially in error, and that subsequent information caused it to reconsider its theory of the case, the only evidence that may be characterized as ''newly discovered'' is comprised of the testimonial recantations of facts that appear in sworn Board affidavits and TEC statements, which statements the General Counsel attacks as being unreflective of what the affiants actually said or meant. Under the circumstances, such testimonial recantations are simply unpersuasive.

The General Counsel maintains, and various witnesses testified, that the employees were attending a union meeting on the afternoon of March 24, and that they were fully intending to go to work at the prescribed time but did not do so on observing that the buses to which they were assigned were driven out of the terminal by substitute drivers prior to the scheduled departure time; thus, any protest or demonstration necessarily occurred as a result of and subsequent to the buses leaving early. It is extraordinary that no Board affidavit supports this contention. Nor do any of the 60 TEC statements, taken only about 2 weeks after the event in question, state that the buses left early. Nor has the General Counsel been able to demonstrate, as a result of records subpoenaed from the Respondent, that the buses left early.[15]

Had the buses actually left early, thereby depriving the employees of their wages that afternoon in retaliation for their attending a union gathering during off-duty hours, surely this simple fact would have been of critical and paramount importance to the Union and to each individual involved. Significantly, the General Counsel has not presented any plausible rationale for such a material omission in Board or TEC statements. Although some few TEC statements, setting forth the sequence of events, state that the assembled employees were discussing the events of that day, that time passed, and that they thereafter noticed the buses leaving, it is significant that not one of the original[16] statements relates that the buses *left early*, that is, prior to the time the employees would have customarily appeared and signed in for work; nor do the statements state that the employees had been prepared to go to work when they observed their bus leaving the terminal.

Further, as noted above, the charge filed by Local Union Representative Romo with the Texas Human Rights Commission and the EEOC is very specific and contains no reference to the buses leaving early on March 24. Indeed, it is

[13] There is no record evidence that the nature of her afternoon appointment was of more importance than the instant situation.

[14] I need not make any credibility resolutions regarding whether or not Butler uttered any untoward derogatory remarks regarding Hispanics or made bizarre, inexplicable statements during the March 25 meeting. It does appear that the witnesses presented by the General Counsel, however, with the exception of Torres, whom I generally credit with regard to her account of the March 24 bargaining meeting, have made every effort to portray Butler in the most unfavorable light. It should be noted that Torres, who spent several hours with Butler while negotiating with him on March 24, and to whose advantage it would have been to so characterize Butler, did not attribute remarks of such a nature to him.

[15] The record evidence contains voluminous time or trip sheets for the routes driven on March 24. Because they are filled out by each individual driver, and are sometimes difficult to understand, and as some trip sheets may be missing, neither of the parties appears to be utilizing the documents to definitively show the departure times of the buses of the discharged employees. It appears, however, that the majority of buses left the terminal between 2 and 2:30 p.m.

[16] I do not credit the subsequent June 3 and 4 TEC statements of Mejia and Romo that refer to the buses leaving early or to the employees being locked out. It appears that the TEC had initially determined that the employees were not entitled to unemployment compensation benefits, and the subsequent statements reflected an effort to cause the TEC to reconsider its denial of benefits.

significant that it does not allege that the employees were locked out on March 24, but rather alleges that the employees were locked out the following day, March 25, when they sought to return to work. Impliedly, this may be understood as an admission that the employees did not seek to return to work on the afternoon of March 24.

Under the circumstances, the only plausible rationale for failing to make such an assertion, in a timely manner, either to the Board, the TEC, or the Texas Human Rights Commission and the EEOC is, simply, either that it never happened or, in the event the Respondent may have encouraged the drivers to leave the terminal as soon as possible in anticipation of a disruptive work stoppage, that the employees had no intention of working that afternoon in any event. I so find.

In *Energy Coal Partnership*, 269 NLRB 770 (1984), the Board restated the applicable law in this area as follows:

> It has long been recognized that the rights of employees to engage in concerted activities protected by Section 7 of the Act are limited by the requirement under section 9(a) that ''[r]epresentatives designated . . . for the purposes of collective bargaining by the majority of the employees in a unit . . . shall be the exclusive representatives of all the employees in such unit. . . .'' Thus, both the Board and the courts have held that our national labor policy of employee strength through organization ''extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interest of all employees.''[2] Consequently, to extend the protection of Section 7 to dissident activity would undermine the statutory system of bargaining through an exclusive representative, and place employers in the position of trying to placate self-designated minority groups, while at the same time attempting to meet the demands of the duly elected bargaining representative.[3]

[2] *NLRB v. Allis-Chalmers Mfg. Corp*., 388 U.S. 175, 180 (1967).

[3] See *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 58 (1975).

See also *NLRB v. Shop Rite Foods*, 430 F.2d 786 (5th Cir. 1970); *River Oaks Nursing Home*, 275 NLRB 84 (1985); *James Energy Co*., 214 NLRB 790 (1974).

The foregoing cases clearly establish that, for the reasons enunciated above by the Board, ''wildcat'' strikes are outside the protection of the Act; and further, that employees who engage in them may be disciplined or discharged for engaging in such unprotected activity. There appears to be no exception to this well-established doctrine for the protection of innocent employees, such as most of the employees involved here, who may have been misled by local union leaders whom they trusted, and who may have believed that their elected collective-bargaining representative, rather than a dissident group of employees, had advocated the strike. In this regard, it is clear that the Union did not initiate, authorize, support, condone, or otherwise indicate a common cause with the employees who elected to refrain from working on the afternoon of March 24. Indeed, the record demonstrates that the Union specifically disavowed any responsibility for the walkout, and had repeatedly warned responsible local union representatives of the consequences of such unauthorized action.

The walkout was intended to further the immediate objectives of Briseno and other dissident employees who were antagonized by Attorney Butler's demeanor and who became impatient with the bargaining process. Clearly, the walkout was contrary to and in criticism of the objectives of the Union, which were expressed to Briseno and the bargaining committee by Torres, and may be reasonably summarized as follows: to refrain from any strike activity, to postpone the discussion of the suspended employees and make no further demands for their immediate reinstatement, and to proceed in a methodical and noncontentious manner toward the eventual culmination of a collective-bargaining agreement and the resolution of pending grievances. Accordingly, I find that the walkout was unprotected and I shall dismiss this allegation of the amended complaint. Cf. *NLRB v. R. C. Can Co*., 328 F.2d 974, 979 (5th Cir. 1964).[17]

The Act is violated when an employer discharges an employee for mistakenly believing that the employee has engaged in unprotected conduct. *Augusta Bakery Corp*., 298 NLRB 58 (1990); *Roto Rooter*, 288 NLRB 1025 (1988). I credit the testimony of employees Refugio Rivas, Martin Garcia, Basilia Sauceda, Rolando Pena, Juan Salas, and Mario Herrera, as such testimony is not inconsistent with their TEC statements.[18] I find that the named employees attempted to continue working without interruption, but were barred from the premises by the security guards at the gate who erroneously believed, for whatever reason, that the drivers had engaged in unprotected conduct by withholding their services and joining the strikers. In fact, they did not join the strikers until after they had been refused entrance to the workplace by the guards. I find that the Respondent has violated Section 8(a)(3) of the Act by discharging those employees.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The Respondent has violated Section 8(a)(3) and (1) of the Act by discharging employees Refugio Rivas, Martin Garcia, Basilia Sauceda, Rolando Pena, Juan Salas, and Mario Herrera because of of a mistaken belief that the employees were engaging in an unprotected work stoppage.
4. The Respondent has not engaged in other unfair labor practices as alleged.

THE REMEDY

Having found that the Respondent has violated Section 8(a)(1) and (3) of the Act, I recommend that it be required to cease and desist therefrom and in any like or related manner interfering with, restraining, or coercing its employees in

[17] It should be noted that in *Shop Rite*, supra, the Fifth Circuit noted that *R. C. Can Co*., on which case the General Counsel relies, ''is of doubtful viability.''

[18] I do not credit the testimony of Antonio Sierra, and find, as clearly set forth in his TEC statement, that he did elect to refrain from working on the morning of March 25.

the exercise of their rights under Section 7 of the Act. Moreover, the Respondent shall be required to post an appropriate notice, attached hereto as ''Appendix.''

Having found that the Respondent unlawfully discharged the aforenamed employees, I recommend that it make them whole for any loss of earnings and benefits they may have suffered by reason of the Respondent's discrimination against them. Backpay is to be computed in accordance with the Board's decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

As the Respondent's contract with the Brownsville Independent School District has been terminated and there is no longer a collective-bargaining relationship between it and the Union at that location, the remedy contains no provision for reinstatement. Further, there appears to be no practical reason for the posting of a notice at the Respondent's corporate headquarters, as no unit employees are employed there. The Respondent shall be required to mail Spanish and English copies of an appropriate notice, however, attached hereto as ''Appendix,'' to each of the six unlawfully discharged employees and to the Union.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The Respondent, Durham Transportation, Inc., Brownsville, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because of suspected unprotected conduct when, in fact, the employees have not engaged in such conduct.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the purposes of the Act.

(a) Make employees Refugio Rivas, Martin Garcia, Basilia Sauceda, Rolando Pena, Juan Salas, and Mario Herrera whole for any loss of pay or benefits suffered by reason of the discrimination against them, in the manner described above in the remedy section.

(b) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Mail to the Union and to each of the six named employees Spanish and English versions of the attached notice marked ''Appendix.''[20] Copies of the notice, in Spanish and English, on forms provided by the Regional Director for Region 16, shall be signed by the Respondent's representative.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''